In the Supreme Court of the United States

OCTOBER TERM, 1922.

HOUSTON COAL COMPANY, PLAINTIFF IN error,
v.
THE UNITED STATES OF AMERICA. } No. 365.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This writ of error brings up for review a judgment of the District Court for the Southern District of Ohio dismissing a petition brought by the plaintiff in error, upon the ground that that court had no jurisdiction to entertain the action. The district judge made a certificate, pursuant to Section 238 of the Judicial Code, that the jurisdiction of the court of the subject-matter of the action was in issue, and was decided adversely to the plaintiff, and that by reason thereof, and not otherwise, the judgment of dismissal was entered; and certified the following question:

"Whether upon the pleadings and particularly the amended petition as amended filed by the plaintiff

in said cause, this court acquired jurisdiction of the subject-matter of the action." (P. 61.)

The specific question is whether the District Court has jurisdiction to entertain an action against the United States, under Section 10 of the Lever Act (40 Stat. 276), to recover just compensation for property requisitioned, after the property owner has accepted the full amount determined by the President to be just compensation for his property.

Section 10 of the Lever Act, so far as it is pertinent, is as follows:

> That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amounts as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies. * * *

The petition seeks to recover the sum of $314,730.74, alleged to be the difference between the

amount received by the plaintiff from the Government for coal requisitioned under the Lever Act and what is claimed would have been just compensation therefor. The original petition alleged 42 causes of action, identical except as to dates, quantities, and amounts, each claiming the difference between $4 per ton and an amount greater than that, alleged to be the proper and just compensation. The allegation common to all counts was that the President, by the Secretary of the Navy, requisitioned, as necessary to the maintenance of the Navy, a certain quantity of coal, "and as a just compensation therefor, refused to pay a greater sum than $4 a gross ton for said coal over the protest of this plaintiff"; that the coal was delivered pursuant to command of the Secretary of the Navy, and that "the amount received by the plaintiff for said coal was $4.00 a gross ton, whereas the proper and just compensation for said coal when the same was requisitioned was not less than $8.00" (or some other sum larger than $4, varying in the different counts). (P. 1.)

A motion to dismiss the bill was made and was granted, Judge Peck writing an opinion, which appears on pages 4 to 7 of the record.

In construing the pleading the court said:

> It is fair to construe this pleading to mean that the President fixed $4.00 per ton as just compensation over the protest of the plaintiff; that the plaintiff delivered the coal and was then paid and received the amount so fixed by the President.

This construction of the pleading seems to have been acquiesced in, and the case proceeded upon that basis. After the motion was granted and the petition dismissed, an amended petition was filed pursuant to leave granted. In this amended petition the plaintiff attempted to introduce into the case some new elements by the following allegation (p. 8):

> Plaintiff says that by reason of threats made against said plaintiff by the Secretary of the Navy through officers of the Navy thereunto authorized, the said sum was accepted by way of partial payment, under protest, however, plaintiff asserting that it accepted said sum under duress, and because of the threats of the officers of the Navy, as aforesaid, and that in so accepting said sum it, the plaintiff, protested to the Secretary of the Navy and reserved all rights which it might have to collect the full amount of what was just compensation over and above said sum of $4.00 per gross ton, and over and above said sum of $8,000.00, and that said sum of $8,000.00 was paid to plaintiff, as aforesaid, with full knowledge on the part of said officers of said protest.

After this pleading was filed the court made an order (p. 53) allowing the plaintiff to amend the amended petition by inserting in each cause of action a paragraph setting forth facts which the plaintiff claimed constituted the duress under which it claims to have accepted the sums fixed by the President.

The amendment thus filed (pp. 53 and 54) was as follows:

> Plaintiff says that said threats were to the effect that a certain document must be signed by the plaintiff electing either to accept the price so fixed by the President in full of its claim or to express a willingness to receive 75% of said amount and sue the United States for the difference between said 75% and what would make up just compensation; that when the plaintiff protested against signing said document, it was informed by said officers that said document was an order and not a contract and must be obeyed, and that if it was not obeyed, certain payments then due or to become due to said plaintiff would not be paid, and that its coal and its mines, and those under its control, would be confiscated and taken over by and through said officers acting for the United States, although there was no claim by said officers that the President had, or would find it necessary to secure an adequate supply of necessaries for the support of the Army, or the maintenance of the Navy, or for any other public use connected with the common defense to take over its mines or confiscate its coal, and although there was in fact and to the full knowledge of the President and of said officers an abundant supply or source of supply for all of said purposes at just and reasonable prices, and although the plaintiff had failed or neglected in no wise to conform to the prices or regulations fixed or made by the President, or to conduct its business efficiently,

or to do any of the things required by it to be done under Section 25 of the foregoing act of Congress, or any section thereof.

Plaintiff further says that the same threats were made by the same officers touching the acceptance by said plaintiff of said price so fixed by the President as just compensation, and under the same circumstances as aforesaid, and that said orders were obeyed and said price was accepted by the plaintiff in fear of said threats, and in the belief that but for compliance with said orders and said fixing of prices, it would be barred from receiving the money then due or owing to it from the United States, or about to become due and it would have its coal confiscated, and would be deprived of the control of the mines and other properties belonging to it or under its supervision and control, greatly to its loss and detriment.

Judge Peck thereupon dismissed the amended petition as amended, holding that the facts constituting the alleged duress were insufficient to take the case out of the principles laid down in his opinion dismissing the original petition.

ARGUMENT.

THE JURISDICTION CONFERRED UPON THE DISTRICT COURTS BY SECTION 10 OF THE LEVER ACT DOES NOT EXTEND TO SUITS BROUGHT TO RECOVER ADDITIONAL COMPENSATION AFTER THE PROPERTY OWNER HAS ELECTED TO RECEIVE, AND HAS RECEIVED, THE AMOUNT DETERMINED BY THE PRESIDENT TO BE JUST COMPENSATION, NOR TO SUITS TO AVOID AN ACCORD AND SATISFACTION UPON THE GROUND THAT IT WAS OBTAINED BY DURESS.

The situation in which the plaintiff now finds itself is the result of its attempt to serve its own interest in deliberate disregard of a plain Act of Congress. If it has not received just compensation for its coal and has lost its right thereto, it is not the fault of the United States, for Congress made ample provision for ascertaining and paying, including the right of trial by jury in local courts, deemed by many a valuable right to claimants, and one not generally provided in suits against the United States.

Section 10 of the Lever Act provided two methods of payment. First, the President was directed to ascertain the just compensation and pay it. Second, if the owner of the property taken elected not to accept the President's award he was to be paid 75 per cent thereof and could sue for such additional amount as would make the compensation just, and jurisdiction was conferred upon the District Courts to hear and determine that issue.

The Government claims that such were the only issues which the District Courts were empowered to entertain.

(a) The alleged causes of action set forth in its petition as variously amended are not such as are cognizable in the District Courts.

The sole question here is whether the plaintiff has alleged a cause of action of which the District Court has jurisdiction under Section 10 of the Lever Act. That question has been certified by the District Judge under Section 238 of the Judicial Code.

The District Courts have no general jurisdiction of suits against the United States other than that conferred by Section 24 of the Judicial Code, pursuant to which they sit as Courts of Claims, without a jury, in cases involving claims not exceeding $10,000. Statutes extending the right to sue the Government and conferring jurisdiction upon the courts for that purpose will, as a general rule, be strictly construed (*Blackfeather* v. *United States*, 378 U. S. 376), and the jurisdiction can not be enlarged by implication (*Price* v. *United States*, 174 U. S. 373, 375). As regards all courts of the United States, inferior to the Supreme Court, two things are necessary to create jurisdiction:

> The Constitution must have given to the court the capacity to take it, and an Act of Congress must have supplied it. Their concurrence is necessary to vest it. *The Mayor, etc., of Nashville* v. *Cooper*, 6 Wall. 247, 252.

It is only when a controversy within the terms of the Lever Act is stated that the District Court has jurisdiction to entertain it against the United States. If that court might not entertain the case by virtue

of that particular Act, it might not entertain it at all. That the petition must show a case within the statutory permission to sue the United States or fail for want of jurisdiction is undoubted. *Hill* v. *United States*, 149 U. S. 593; *Haupt* v. *United States*, 254 U. S. 272; *Great Western Serum Company* v. *United States*, 254 U. S. 240; *United States* v. *Nederlansch-Amerikaansche Stoomvart*, 254 U. S. 148.

In the case of *United States* v. *Pfitsch*, 256 U. S. 547, this court examined the nature of the jurisdiction conferred by Section 10 of the Lever Act upon the Districts Courts, for the purpose of deciding whether review of decisions of those Courts, in cases brought under that section, was by direct writ of error from the Supreme Court or from the Circuit Courts of Appeals, and reached the conclusion from the legislative history of the Act, and by comparison with other acts, that Congress deliberately conferred jurisdiction upon the Distr ct Courts, for the purpose of allowing trial by jury. The court said:

> It is difficult to conceive of any rational ground for rejecting the clear and explicit amendment made by the Senate except to accord trial by jury.

The court pointed out that, where the jurisdiction of the District Court was concurrent with that of the Court of Claims where the amount involved did not exceed $10,000, all suits brought and tried should be tried by the court without a jury.

It would seem to be clear that, from the lauguage of Section 10 of the Lever Act, the only issue which

Congress contemplated would arise under the Act was that of just compensation, and it was willing, indeed, it insisted, that the property owner have the right of trial by jury as to that issue. It is plain that where compliance was made with the terms of that Act such would be the only issue to submit to the jury; but the plaintiff, unwilling to comply with the terms of that Act, and in an endeavor to circumvent the Act and at the same time make out a cause of action against the United States, has insisted in interjecting into its alleged cause of action issues which are clearly beyond the contemplation of Congress and which Congress has never shown a willingness to submit generally and without reservation to the District Courts.

An examination of the plaintiff's petition, as finally perfected by amendment, indicates great reluctance to set forth the facts in a plain, simple manner, but the only conclusion which can be drawn, which was drawn by the District Court and is apparently conceded by the appellant, is that the President requisitioned coal belonging to the plaintiff, and, pursuant to the Lever Act, fixed a price to be paid as just compensation; that the plaintiff was unwilling to accept that price, and was also unwilling to make an election under the Act either to accept it in full or to accept 75 per cent of it and retain its right to sue for the balance. It is alleged that the naval officers required him to elect, and the duress, which he alleges, was in requiring him to make the election. He thereupon, apparently,

elected to take the full amount, but at the same time attempted to reserve the same right which he would have had had he elected not to take the full amount. Apparently he signed some paper, which he has not set forth, but which he describes as an election "either to accept the price so fixed by the President in full of its claim or to express a willingness to receive 75 per cent of said amount and sue the United States for the difference between the said amount and what would make up just compensation." Receiving money tendered as full compensation and giving a receipt in full, unless given in ignorance of its purport or under circumstances constituting a duress, is an acquittance in bar of any further demand. *De Arnaud* v. *United States*, 151 U. S. 483. So the plaintiff seeks to avoid the accord and satisfaction by claiming duress, and that is an issue which it seeks to try in the District Court under Section 10 of the Lever Act.

The alleged facts constituting the duress are that plaintiff was told that the document which it was asked to sign was an order; that, if it was not obeyed, certain payments then due and to become due would not be paid; that its coal and mines would be confiscated, although there was no claim by the officers making the threats that the President would find it necessary, to secure an adequate supply of necessaries for the Army or for the maintenance of the Navy, or for any other public use connected with the common defense, to take over the mines or confiscate the coal, and although the fact was, to the

full knowledge of the President and of the officers, that there was an abundant supply, or source of supply, for all of said purposes.

In avoidance of the receipt in full which it gave, the plaintiff therefore seeks to obtain the verdict of a jury upon the good faith of the President of the United States and of the officers acting under his authority. To hold that Section 10 of the Lever Act conferred general jurisdiction upon the District Courts to try with a jury cases involving such issues as these is not to be believed. It is not merely an action for just compensation. It seeks to set aside an accord and satisfaction on the ground of duress.

(b) **After a property owner has elected to take, and has received, the award of the President, no cause of action cognizable in the District Courts remains.**

The language of the Act conveys no suggestion that any cause of action was left open to the property owner after he had received and accepted the President's award. As already pointed out, the jurisdiction conferred by Section 10 was special and distinct from that of the Court of Claims and was given for the purpose of allowing to the property owner the right of trial by jury. It was not intended to confer a general jurisdiction upon the district courts to hear all cases upon contract against the United States and obviously did not contemplate that the property owner might receive the full amount of the President's award and at the same time preserve his controversy and bring it into court. It was only in

extinguishment of the claim that payment of the full award was authorized, and it was only in full satisfaction of the demand that such payment could be received. The jurisdiction was limited to the cases in which the property owner had elected to accept the 75 per cent and sue for the balance, and it was only by exercising that election that he had a right to invoke that jurisdiction. Having an election to take all in full, or three-quarters on account, he could not take all, even though he protested that it was only on account, and claim the privilege accorded him by the statute.

It is not necessary to decide trivial questions, such as the effect of the payment of 74 per cent or 76 per cent to a plaintiff who had elected to take 75 per cent of the amount found by the President to be proper, or the effect of no payment whatever. The Court of Claims has general jurisdiction to hear and determine claims against the United States arising under the Constitution or Acts of Congress, where private property has been taken by the United States. Neither is it necessary to determine whether, under any view of the case, the plaintiff might have a cause of action against the United States.

The Government has consented to be sued in the District Court by those who, being dissatisfied, have accepted three-fourths of the award, but it is impossible to find assent to be sued by those who have accepted the award in full and merely desire to review a determination of which they have had full advantage. When the President's award has been accepted, so far as the jurisdiction of the district court is

concerned, it becomes a case of accord and satisfaction. As the court below said:

> The President's authority to fix just compensation became conclusive upon the plaintiff when it accepted the amount fixed, and no justiciable controversy was left open to be brought here under the Act.

This construction does not deny to plaintiff any right to have his just compensation ascertained by a judicial process. No particular method for obtaining just compensation is necessary so long as it is conducted in some fair and just manner with opportunity for the owner to present evidence and be heard. *Bauman* v. *Ross*, 167 U. S. 548; *United States* v. *Jones*, 109 U. S. 513. It was quite competent for Congress to invest in the President the power of determining in the first instance what just compensation should be. Indeed t was greatly to the benefit of the property owner, for if the amount fixed was satisfactory it secured to him his money speedily and without the expense or uncertainty of litigation. If, however, the amount fixed by the President was unsatisfactory, there was no injustice in paying him but 75 per cent of that amount, for the hazard of a trial might result in a determination that the award of the President had been too large. At any rate Congress had a right to fix the procedure and prescribe the jurisdiction of the courts in which the United States consented to be sued.

II.

THE FACTS CONSTITUTING THE ALLEGED DURESS ARE UNAVAILING.

The plaintiff does not claim that it was coerced into accepting the amount of the President's award. On page 25 of its brief it is said:

> While we do not insist that the acceptance *of the money* by the Houston Coal Company was compelled by the duress of the Navy officers, what we do contend is that the acquittance of the United States and the agreement to extinguish the claim against the United States, which the court below (R. 5) deduces from the facts stated in the petition and from Section 10, even if the court's deduction is correct, are void and of no effect.

The election which the plaintiff alleges it was compelled to make by threats was the election necessary to be made under the statute, and if the threats were actually made, as we suppose must be taken for granted upon the motion to dismiss, they put upon plaintiff no greater hardship than did the law. It is not alleged that the plaintiff was required to elect to take the President's award, or that in making its choice it was influenced by threats one way or the other. It was merely forced to choose. As the court below said:

> For anything shown by the petition, the plaintiff's election to accept the award in full, rather than seventy-five per cent and obtain the right to sue, was uncontrolled, free and voluntary.

What the plaintiff objected to doing was making the election required by the Act of Congress. It wished to receive the entire amount of the President's award and at the same time preserve its cause of action against the United States. It wished to play fast and loose with the Government, and, in framing its petition, seems to have proceeded upon the theory that all that is necessary to do to confer jurisdiction upon a United States court is to assert the claim that some duress has been practiced by officers of the Navy.

We submit, however, that there is no known legal principle which holds or suggests that a man is deprived of his freedom of conduct and acts under compulsion when he is required to make an election which the law says he shall make. If the Government officers actually required him to make his election in writing, the chances are that the reason for it was because they discerned in plaintiff's attitude an unwillingness to be candid and frank in dealing with it. But, however this may be, they did not require the appellant to do more than signify an election. They required only that which it was his duty in dealing with the Government to do, and no one can be said to act under duress when he is required merely to do his duty. In no aspect do the threats relied upon constitute duress. Threatened withholding of payment is not duress. *Silliman* v. *United States*, 101 U. S. 465. The threatened confiscation and taking over of the mines were steps that the President had a right to take.

The plaintiff does not state that it has rescinded the election which it made, or tendered back to the Government the additional 25 per cent. Contracts made under duress are not void, but voidable. They are valid until rescinded. Rescission must be made within a reasonable time after the duress is removed and must be accompanied by the return of that which was acquired under the enforced contract. 9 Ruling Case Law, page 725.

The claim is made that the plaintiff should not be required to tender the excess, under the familiar rule that one need not tender back that to which the other admits he is entitled, but, under the Lever Act, the President's award determines the compensation only for purposes of settlement. The award, if accepted, binds both parties; if rejected, it binds neither. If the claimant is not willing to accept it and sues for more, he must risk getting less. It can not be said, therefore, that it is admitted, as a matter of law, that plaintiff, after it had elected the partial settlement, would nevertheless have been entitled in any event to the full award. Hence the necessity of rescinding and tendering back the 25 per cent in order to undo such a settlement, if made under duress.

In the case of *Silliman* v. *United States*, 101 U. S. 465, which was an appeal from the Court of Claims, the claimants had executed a new contract to the Government in place of an old one, on the Government's refusing to carry out the old one, and it was alleged that the Quartermaster's Department of the Army demanded the execution of the new contract

containing stipulations essentially different from the old, and announced its purpose to retain possession of the claimant's bridges and withhold all compensation unless and until the claimants executed the same. They signed the new agreement under protest and under pressure of financial necessity and thereafter sued for the compensation originally stipulated. This Court held that the facts stated were insufficient to prove duress. Mr. Justice Harlan, delivering the opinion of the Court, said:

> Instead, however, of seeking the aid of the law, claimants, with a full knowledge of their legal rights, executed new charter parties and, from time to time, received payments according to the rates prescribed therein; protesting, when the new agreements were signed, that they were executed against their wishes and under the pressure of financial necessity. They now seek the aid of the law to enforce their rights under the original charter parties, upon the ground that those last signed were executed under such circumstances as amounted, in law, to duress. Duress of, or in, what? Not of their persons, for there is no pretense that a refusal, on their part, to accede to the illegal demand of the Quartermaster's Department would have endangered their liberty or their personal security. There was no threat of injury to their persons or to their property, to avoid which it became necessary to execute new charter parties executed for the purpose, or as a means of obtaining possession of their property. They yielded to the threat or demand of the depart-

> ment solely because they required, or supposed they required, money for the conduct of their business or to meet their pecuniary obligations to others. Their duty, if they expected to rely upon the law for protection, was to disregard the threat of the department, and apply to the courts for redress against its repudiation of a valid contract.
>
> We are aware of no authority in the text books or in the adjudged cases to justify us in holding that the last charter parties were executed under duress. There is present no element of duress, in the legal acceptation of that word. The hardships of particular cases should not induce the courts to disregard the long settled rules of law.

On page 20 of the brief submitted on behalf of the Atlantic Refining Company and others *amici curiae*, the question is asked at page 20:

> On what may the citizen rely for the sure protection of the substance of the right to just compensation guaranteed by the Constitution and recognized by Congress? On the pledge of the "public good faith"—the the Honor of the Republic.

There is nothing in the position or claim of the plaintiff in this case which entitles it to any sympathy, nor is there anything in the attitude of the Government which calls for any heated rhetoric or impugning of the public good faith. The difficulty in which the plaintiff finds itself is due solely to its own perversity in attempting to play fast and loose with the Government. It failed to observe the injunction of this court "that men must turn square corners

when they deal with the Government." *Rock Island, etc., Ry. Co.* v. *United States,* 254 U. S. 141. The plaintiff's right to just compensation was amply protected by the Act of Congress. It could have elected to take 75 per cent of the President's offer, and does not claim that it did not have freedom of choice to make that election, if it had been so minded. Had it done so, it could have brought its action, and if, as a matter of fact, the President's award was not adequate, it would have had no difficulty in submitting the issue to a jury, and having it decided long ago, as was done in the *Seaboard Air Line* and *Benedict Cases,* decided by this court March 5, 1923. Instead of taking that straightforward and simple course, however, its apparent object was to cajole the Navy Department into paying the entire amount of the President's award by signing the usual voucher in such cases and, at the same time, preserve its right to action against the United States and submit its case to a local jury before which it could pose as a victim of governmental coercion, duress, compulsion, and bad faith.

If it has any cause of action involving these issues, it must litigate it somewhere else than in the District Court under the limited jurisdiction conferred by Section 10 of the Lever Act.

The judgment of the court below should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

APRIL, 1923.

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IN THE

Supreme Court of the United States.

October Term, 1922. No. 365.

HOUSTON COAL COMPANY,
Plaintiff-in-Error,

v.

THE UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF THE ATLANTIC REFINING COMPANY, THE NEW RIVER COLLIERIES COMPANY, AND THE FULTON COMPANY, AMICI CURIÆ.

STATEMENT OF QUESTION INVOLVED.

Where an Act of Congress provides that a citizen whose property has been commandeered shall be paid 75% of value fixed by the Government and shall have the right to sue to recover the balance of just compensation, is the jurisdiction of the Court ousted by the payment of more than 75%, not paid or received in full settlement, the citizen expressly reserving the right to sue for balance of just compensation claimed; *viz.*, market value?

STATEMENT.

Plaintiff-in-error sued to recover balance of *just compensation* for coal commandeered, admitting the receipt of certain payments on account, but alleging that in accepting said payments plaintiff-in-error "*reserved all rights which it might have to collect the full amount of what was just compensation over and above said sum . . .*" (Transcript, pp. 8, 9).

The amounts received were 100% of the values fixed by the Secretary of the Navy acting for the President of the United States under the authority of the so-called Lever Act of August 10, 1917. The lower Court held that its jurisdiction was ousted by plaintiff's having received more than 75% of the tentative prices fixed for the President.

ARGUMENT.

We contend

I. The plaintiff-in-error having "saved the question of the price" necessarily retained its right to sue for balance of just compensation. And it cannot be presumed that Congress intended to oust the jurisdiction of the courts in respect of such plain Constitutional right.

II. The basic jurisdictional facts are the commandeering and the non-payment to the citizen of the full just compensation secured by the Constitution and by the act.

III. The provision of the Lever Act relative to the payment of 75% is not jurisdictional.

IV. So far as concerns the rights of citizens and the jurisdiction of the Court, the 75% provisions of the act were directory, not mandatory.

V. Even if the 75% provision were mandatory so far as concerns the Government officials, it is not so as regards the citizen's rights and the jurisdiction of courts.

I. THE PLAINTIFF-IN-ERROR HAVING "SAVED THE QUESTION OF THE PRICE" NECESSARILY RETAINED ITS RIGHT TO SUE FOR BALANCE OF JUST COMPENSATION. AND IT CANNOT BE PRESUMED THAT CONGRESS INTENDED TO OUST THE JURISDICTION OF THE COURTS IN RESPECT OF SUCH PLAIN CONSTITUTIONAL RIGHT.

In

American Smelting Company v. U. S., 259 U. S. 75, 78 (1922), Mr. Justice Holmes said,

> "But if it had desired to stand upon its legal rights *it should have saved the question of the price.*"

This is exactly what the claimant did do in the case now at bar. It reserved

> "*all rights which it might have to collect the full amount of what was just compensation . . .*"
> (Transcript, pp. 8, 9.)

It is, of course, hornbook law that to constitute an accord and satisfaction, the money must not only be paid but must likewise be accepted with the intent of both the creditor and debtor that it is in full satisfaction of the outstanding indebtedness:

> "To constitute a valid accord and satisfaction, it is also essential that what is given or agreed to be performed, shall be offered as a satisfaction and extinction of the original demand; that the debtor shall intend it as a satisfaction of such obligation, and that such intention shall be made known to the creditor in some unmistakable manner. It is especially essential that the creditor shall have accepted with the intention that it should operate as a satisfaction. Both the giving and the acceptance of satisfaction are essential elements, and if they be lacking, there can be no

accord and satisfaction. The intention of the parties, which is of course controlling, must be determined from all the circumstances attending the transaction."

1 C. J., p. 529, Sec. 16;
McKeen v. Morse, 49 Fed. 253 (1891);
First Nat'l Bank v. Leech, 94 Fed. 310 (1889).

Of course the question of jurisdiction is the only one now before the Court, the District Court having ruled flatly that it had no jurisdiction. But, while finding it had no jurisdiction, THE COURT WENT ON TO HOLD THAT THE PLAINTIFF HAD NO CASE ON THE MERITS, MERELY BECAUSE OF THE RECEIPT OF 100% OF THE PRICES FIXED BY THE GOVERNMENT. THIS HOLDING IS A REDUCTIO AD ABSURDUM OF THE POSITION ASSUMED BY THE COURT BELOW. The Court, without any basis found in the act itself, reads the act as if it provided as a penalty that the receipt of the 100%, even though under protest and with full reservation of the right to sue for the balance of real just compensation, extinguished the right of the plaintiff. That is to say, that contrary to the intention of the parties, Congress intended to create a *statutory accord and satisfaction.* Now Congress might have provided by express words or necessary implication that the citizen should *not* receive 100% of the amount which the Government admitted to be due, except in full payment, settlement, satisfaction and discharge of the citizen's entire claim for just compensation, no matter how much "just compensation" might be in excess of the payment so made. But such a provision would have been so extraordinary and unusual, not to say fantastic and bizarre, and would have been in so ruthless a disregard of a fundamental constitutional right, that such an in-

tent cannot be lightly presumed. The act, in fact, says nothing relative to the 100%, or the consequences of the payment and receipt of 100%. Therefore, that phase of the matter is left precisely as it was under the general law relative to such matters. And the general law is, in accordance with primary principles of justice, that the payment of a smaller sum will not extinguish a right to a larger.

San Juan v. St. Johns Gas Co., 195 U. S. 510 (1903);
Chicago Ry. v. Clerk, 178 U. S., 353 (1899);
Baird v. U. S., 96 U. S., 430 (1877);
Fire Ins. Co. v. Wickham, 141 U. S. 564 (1891).

Unless there is a substantial dispute relative to the liability for the larger amount and *the amount is received in compromise and full satisfaction.* These elements, namely, that the money must be both paid and received in full satisfaction, are of the essence.

The true situation, therefore, is that the citizen may safely receive a further payment on account *unless it agreed that such payment should be in accord and satisfaction.* Here the contrary appears. The plaintiff dissented and reserved its rights. Hence the right to sue for the balance of just compensation was not extinguished.

So far as appears there was no dispute that the market values claimed by plaintiff were in fact market values, and hence the only true and real basis for "just compensation." The amounts paid by the Navy were about $4 per ton, whereas the market prices averred varied from $8 to $21 per ton. It is evident that the Navy had a theory all its own of value of "just compensation." But the plaintiff's theory being the true one, plaintiff on proof of commandeering

and of undisputed market value would be entitled to a directed verdict, together with "damages for detention." So that while in a sense plaintiff's claim was unliquidated, the measure of its right was so clear-cut and readily ascertainable as to be indisputable. And this plain right the Navy attempted to ignore.

The conflict, as in the New River Collieries Company case, argued before this Court on March 8th, 1923, and in the case of The Atlantic Refining Company v. United States, now pending in the Court of Claims, is between the true measure of just compensation, namely, market value, and the Navy's theory of "cost plus a reasonable profit." There is no evidence that the plaintiff ever acquiesced in the latter theory or measure. On the contrary, its assertion has been throughout that the true measure of just compensation was market value and that it was entitled thereto. If the plaintiff is correct in this view of the law, the resultant enormous hardship to it in the assertion of a clear constitutional right finds no countenance whatsoever in the words of Congress.

Plaintiff expressly reserved its rights and having "saved the question of the price" stands upon solid ground on the merits.

AND IF THE RIGHT TO RECOVER THE BALANCE OF JUST COMPENSATION WAS NOT EXTINGUISHED IT WOULD SEEM CLEAR THAT THERE COULD HAVE BEEN NO CONGRESSIONAL INTENT TO PRECLUDE THE RIGHT TO SUE THEREFOR. THE GENERAL PURPOSE OF THE ACT WAS TO PROTECT THE CITIZEN IN THE RIGHT TO JUST COMPENSATION. THERE IS NO EVIDENCE OF AN INTENT TO IMPALE THE CITIZEN ON THE SHARP HORNS OF A DILEMMA.

II. THE BASIC JURISDICTIONAL FACTS ARE THE COMMANDEERING AND THE NON-PAYMENT TO THE CITIZEN OF THE FULL JUST COMPENSATION SECURED BY THE CONSTITUTION AND BY THE ACT.

In effect the Government contends that Congress said to the President:

> "You may not pay more than 75 per cent., even though you may regard it as common justice to the citizen to pay 90 per cent. or 100 per cent., or even though you may regard it as desirable to save the Government damages by way of detention; such payments are unauthorized; such payments will oust the jurisdiction of the Court."

In effect the Government represents Congress as having said to citizens whose goods were commandeered:

> "It is true you have a Constitutional right to recover just compensation and that the measure of just compensation is for the Courts. But we will provide a system under which you must elect at your peril not to take more than 75 per cent. of amounts fixed as just compensation, not by the Courts but by the executive branch of the Government, which we know has no power to fix finally the measure of just compensation.
>
> "In authorizing you to sue for the excess, or the difference between the percentage paid and what would be judicially declared to be just compensation, we mean to impale you on the sharp horns of a dilemma. You must see to it at your peril that you do not take more than 75 per cent. of the amount fixed. If you do, you may not sue at all. You must wait until the just compensation is fixed, though the delay may be a year and a half or more.
>
> "Any payment made either before or after such final determination which turns out to be in excess of the statutory percentage will defeat the jurisdiction of the Court."

May not the Government save accruing charges by way of interest or "damages for detention" by paying in excess of 75 per cent. and if the Government elects so to do, may not the citizen accept it on account without losing his right of action?

The right to sue for commandeered material existed previously to the passage of the acts in question and was a general right based upon the Constitution and recognized by the Tucker Act. The act relied on by the Government in substance directs that a certain percentage should be paid and that the citizen should have the right to sue for the balance of just compensation. It would have been unjust and unreasonable, and perhaps unconstitutional, but Congress *might* have said that *no* payment should be made except upon suit brought. Congress might have said in unmistakable terms, or by necessary implication, that the fixing of the price by the President and the payment of a percentage thereof in exact amount, should be the condition precedent to the bringing of suit. But Congress did not say this in so many words, and unless it is the necessary implication from the language used the Congressional intent should not be so construed. For the conclusion involves both absurdity and unnecessary hardship.

In effect the Government represents Congress as having said that it is not only the duty of the President to fix prices and to see that 75 per cent. thereof is paid, *but that*, notwithstanding general appropriation acts and available funds for the purpose of acquiring materials, or paying for materials acquired, *the President has no authority to pay more than 75 per cent.;* and if he does, the entire fabric of plaintiff's rights is destroyed.

We contend that the administrative department of the United States had general power to make the payments made in this case, without attaching thereto the consequence claimed and without a conclusive and irrebuttable inference arising either that the plaintiff-in-error was paid in full or that the jurisdiction of the Court was ousted.

The citizens' goods are commandeered.

He becomes entitled to just compensation.

That means market price—real value. What he can get for it.

Mistakenly, the Navy suggests another basis unknown to the law.

He declines to acquiesce.

He receives the payment merely on account.

He reserves his right to sue for balance of "just compensation."

He comes into a court admittedly having general jurisdiction of the subject-matter.

U. S. v. Pfitsch, 256 U. S. 547.

He has a valid claim to a balance of just compensation.

He is told by his own Government .

Which has compulsorily taken his property

That he has forfeited his right to sue

Because he has received more than 75 per cent.

Of an amount fixed by Executive authority

In complete disregard of his rights and over his protest.

If a citizen were to so contend

As against another citizen

It would be thought rankly dishonest.

Why should governments set such an example

In the face of "the pledge . . . of the public good faith . . ."

Crozier v. Krupp, 224 U. S. 306 (1912).

When there are present the essential elements of jurisdiction, *viz.*, the commandeering and non-payment of the balance of just compensation therefor.

And we have the plain general intent of Congress to confer jurisdiction of suits to recover balance of just compensation?

III. THE PROVISION OF THE LEVER ACT RELATIVE TO THE PAYMENT OF 75% IS NOT JURISDICTIONAL.

While the amount received by plaintiff-in-error was 100% of the tentative price fixed by the Government, it would seem that the same principle should apply whether the amount received was 76% or 99% or 100%.

Is the provision of the Lever Act relative to the payment of 75% a jurisdictional provision?

IF AN EXACT COMPLIANCE WITH THE 75% PROVISION IS JURISDICTIONAL, THEN THERE CAN BE NO SUIT UNTIL THE EXACT 75% IS PAID, AND NO SUIT IF ANY AMOUNT IN EXCESS OF THE 75% IS PAID.

In

United States v. McGrane, 270 Fed. 761 (1921);

New River Collieries Co. v. U. S., 276 Fed. 690 (1921);

Seaboard Air Line Railway Company v. U. S., Supreme Court of the U. S., October Term, 1922, No. 407, decided on March 5, 1923, in an opinion by Butler, J.,

the plaintiffs had in fact been paid nothing on account, but recovery was allowed, although the plaintiff had not received *anything* on account of the 75%. If it is jurisdictional that the plaintiff shall not have received 100%, then why is it not equally jurisdictional that the plaintiff shall have received 75%? And if the 75% is jurisdictional and it is not paid, how is the plaintiff ever to proceed? Can the Government by failing to comply with this provision of the act oust the jurisdiction of the Court?

And if the provision of the act that the Government shall pay 75% is regarded as a mandatory provision that the Government *shall not pay more than* 75%, can the Government by violating a mandatory provision oust the jurisdiction of the Courts and preclude a constitutional right?

If the 75% provision is jurisdictional, then the citizen could not sue unless 75% in full was paid; and it may be doubted whether the citizen has any remedy to compel the payment of the 75%.

If the 75% is jurisdictional, then the inadvertent payment or receipt of a small sum in excess of the 75% would oust the jurisdiction if the Court. For reading the act strictly as the Court below read it, the payment of the exact 75% is a condition precedent to the right to sue. And the citizen would in some instances be remediless.

The Governmental construction of the 75% provision as directory, by paying more than 75%, and by raising no objection though *nothing* had been paid, would be persuasive in case of doubt.

The provision is directory merely and the Government by its actions showed their construction of it as directory, a construction which is persuasive in case of doubt:

U. S. v. Cerecedo Hermanos y Compania, 209 U. S. 337 (1908);

Robertson v. Downing, 127 U. S. 607 (1887);
U. S. v. Healey, 160 U. S. 136 (1895);
U. S. v. Philbrick, 120 U. S. 52 (1886);
National Lead Co. v. U. S., 232 U. S. 140 (1920);
Paul Jones & Co. v. Mayes, 265 Fed. 365 (1920).

IV. So FAR AS CONCERNS THE RIGHTS OF CITIZENS AND THE JURISDICTION OF THE COURT, THE 75% PROVISIONS OF THE ACT WERE DIRECTORY, NOT MANDATORY.

> "The privilege given in the act for a party to sue the United States is not a privilege given to sue the United States in matters in which that privilege never theretofore existed. It is given as a part of the process of condemnation, without which title to the property could not be acquired by the governing body for public purposes. It does not come within the purview and scope of the general class of claims against the United States, resulting under contracts, or for damages for the unauthorized acts of its officers, who may be personally responsible, but for which the United States could not be sued without its consent."
>
> Filbin Corporation v. U. S., 265 Fed., at p. 358 (1920).

That is to say the claim here involved is a claim based primarily upon the Fifth Amendment of the Constitution of the United States, and the plaintiff's right to have and to sue for just compensation for its property taken by the Government for public use, cannot be taken away by the Act of Congress.

The provision that the President shall fix just compensation, and that the citizen may have 75 per cent. thereof preliminarily, manifestly has no relation

to the right of action; Congress could not constitutionally give the President final authority to determine just compensation:

> "His determination of the compensation to be made could not, by any valid statute passed by Congress, be made conclusive."
>
> Filbin Corporation v. U. S., 265 Fed., at p. 357 (1920).

If the Government officials, presumably acting under direct authority from the President, in order to save damages for delay (the legal rate of interest being usually in excess of that at which the Government can borrow) chose to pay more than 75% (of "cost" plus a reasonable profit—see New River Collieries Company v. United States), the transaction is neither wrong nor improper, but a sensible business transaction for the benefit of the Government and for the protection of the business interests of the country.

Congress will not be presumed to have intended an absurd result.

A mandatory construction, such as now contended for by the Government as ousting the jurisdiction of the Courts results in practical absurdities; and Congress will not be presumed to have intended an absurd result.

United States v. Hogg, 112 Fed., 909 (1902);

Interstate Drainage Co. v. Bd. of Comms., 158 Fed. 270 (1907);

Lau Ow Bew v. United States, 144 U. S. 59 (1891);

Holy Trinity Church v. U. S., 143 U. S. 457 (461), (1891).

The Government's construction of the act not alone raises a serious question of its constitutionality, but does violence to the letter and spirit of the statute. The statute reads:

> "If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid 75 per cent. of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation. . . ."

The connection between the 75 per cent. clause and the clause giving jurisdiction is not such as to make the latter conditional upon the former.

And the spirit and apparent purpose of the act indicate that the 75% provision is collateral to the right to sue and in no sense a condition upon which consent to sue is given.

> "The provision that he (the President) should determine in the first instance so as to pay 75 per cent. of the amount determined by him was a provision in favor of the owner of the property so as not to keep him out of all compensation pending the litigation to which he is entitled by the Constitution to determine what was just compensation."
>
> Filbin Corporation v. U. S., 265 Fed., at p. 357.

The Government errs in its contention that every directory provision in an Act of Congress conferring a right of action against the United States, is in the nature of a condition or term upon which consent to sue is given. Compare, for example, the Tucker Act passed by Congress on March 3, 1887, conferring jurisdiction in cases of claims against the United States

arising under the Constitution of the United States, upon contracts, express or implied, etc. Section 5 thereof provides in effect that any suit under Section 2 should be brought "in the district where the plaintiff resides." Yet, it was held that this provision requiring plaintiff to bring suit against the United States in the district in which plaintiff resides

> "is a personal privilege which the law officers of the Government may waive and in this case did waive by putting in a general appearance."
>
> Per U. S. Cir. Ct. of App., Second Circuit, in U. S. v. N. Y. &c. Co., 216 Fed. 61 (1914); (Appeal dismissed, 238 U. S. 646).

V. Even if the 75% provision were mandatory so far as concerns the Government officials, it is not so as regards the citizens' rights and the jurisdiction of courts.

The act provides a method of dealing with the citizen whose goods are commandeered. The subject-matter is not contractual. The relation contemplated is involuntary so far as concerns the citizen. The act authorizes the commandeering. The act directs payments. In general, the act authorizes suit to recover just compensation, or balance thereof.

Bearing steadily in view that the right in question is a constitutional right secured to the citizen by the Fifth Amendment and that Congress presumably intended to secure to the citizen the full compliance by the Government with the duty of the Government to make whole the citizen for his goods commandeered, what was the intent of Congress as shown in the words of the act?

The power given to the President to fix prices was necessarily a right to fix tentative prices. The

President did not affect to fix prices which would be finally binding on the citizens. The parties to the transaction were not dealing on a basis of equality. No matter how wrong or perverse the theory on which the Government attempted to fix prices and how contrary to settled principles of constitutional law, the citizen could only receive the amount which the Government deigned to give. In other cases in the courts, the prices were attempted to be fixed on a theory wholly contrary to law and in violation of the constitutional rights of the citizen.

Not only did the Government refuse to follow plain and well-settled precepts of constitutional law so far as the measure of damages was concerned, but it saw fit to pay more than 75% of the amount determined to be due by the new measure of compensation set up. Now the act provides for three things—(a) compensation shall be fixed; (b) if it is unsatisfactory the citizen shall receive 75%; and (c) he "shall be entitled to sue the United States to recover such further sum as added to said 75% will make up such amount as will be just compensation . . ." The act does not say what shall happen in case the price fixed is satisfactory. But the result there is automatic; the price is paid and received in full and there is an end to the matter. Nor does the act say what shall happen in the event that the Government desires to pay 100% of the tentative prices and the citizen receives same, reserving his rights.

What did Congress intend under the facts of the case at bar? Did Congress intend to provide two alternatives, each equally non-resilient and each equally Procrustean: 100% and quit, or 75% and sue? Did Congress mean to say, you may not receive more than 75%, except under penalty of ousting the jurisdiction of the Court and extinguishing your claim?

"Shall be paid 75%" is a direction to the Government. But there is no prohibition against paying more than 75%. Congress can scarcely be deemed to have had in mind a case like this in which a citizen's property is attempted to be commandeered at 50%, 25%, 20% of market prices. The Navy must have realized how extreme its position was, and how great the hardship to the citizen. It knew there was a strong likelihood of the Government's being let in for "damages for detention" to the extent of millions upon millions. Hence the Government's willingness to pay 100% of a wholly unjust and inadequate "compensation." The Government might have insisted upon the 100% being accepted in full, and have withheld payment unless it was so received. Then the principle of

American Smelting Co. v. U. S., 259 U. S. 78,

might apply—though that was held to be a case of contract, and here commandeering and commandeering only is averred. But the Government did not insist on an accord and satisfaction in fact, but, on the contrary, paid the money and evidently kept on paying the money in the face of plaintiff's repeated insistence upon reserving its rights to sue for balance of just compensation. The argument must proceed on the footing that, aside from intent, or even aside from express agreement, and in defiance of the usual principles of law, the receipt of more than 75% *ex propria vigore* and by virtue of the act itself necessarily ousts the jurisdiction of the Court.

Viewed from the standpoint of the Government official, he might well say, Congress has limited my authority to pay 75%; it is not for me to say that this is not

"a reasonably just and prompt ascertainment and payment of the compensation."

Crozier v. Krupp, 224 U. S., p. 306 (1912).

But viewed from the standpoint of the citizen, whose property is taken without his consent, and valued, over his objection, at half or less of its real value in the market, the citizen who has a right to feel that his rights are being ridden over rough-shod by ignoring the well-known and universally-acquiesced-in measure of value; the citizen who has a right to rely on a *Constitutional* guaranty that he will be made whole, and knows that Constitutional guaranty has always been held to mean market value; the citizen may well presume that Congress, when it used the very words of the Constitution, meant to confirm and protect him in the full substance of his Constitutional right, and that the main purpose and intent of the act was to confer jurisdiction to recover the balance of that just compensation meant by the Constitution, less any payment made on account thereof.

Oust the jurisdiction of the Courts? Yes, just to the extent to which the claim for just compensation is extinguished and no whit further. If 75% had been paid, the difference between that and just compensation may be recovered; if 100%, the difference between that and just compensation may be recovered; in either case it will be *the balance of just compensation;* in either case it will be

"such further sum as . . . will make up such amount as will be just compensation . . ."

The words "added to said seventy-five per centum" are descriptive and were inserted on the assumption that payments would be limited to 75%; but the substance of the jurisdiction conferred and of the right of recovery alike is "such further sum as . . .

will make up such amount as will be just compensation . . ." And this Court unhesitatingly held, in the face of an act expressly forbidding the payment of "interest," that the Constitutional duty to make the citizen whole as of the taking rose supreme:

> Seaboard Air Line v. U. S. (decided March 5th, 1923, in an opinion by Mr. Justice Butler).

Here, as there, the citizen may rely on the mandate of the Constitution; there is not even a far-fetched inference that Congress did not intend fully to comply with that mandate.

On what may the citizen rely for the sure protection of the substance of the right to just compensation guaranteed by the Constitution and recognized by Congress? On the pledge of the "public good faith"—the Honor of the Republic.

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